BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAAD AL-SAGER	)	
Claimant	)	
	)	
VS.	)	
	)	
DELIVERY LOGISTICS INC.	)	
Respondent	)	Docket No. 1,043,908
	)	
AND	)	
	)	
NATIONAL UNION FIRE INS. CO.	)	
OF PITTSBURGH, PA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 9, 2009 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard (ALJ).

ISSUES

The ALJ found the claimant to be an independent contractor and denied claimant's request for compensation. Additionally, the ALJ concluded the claimant's claim was barred by equitable estoppel from receiving workers compensation benefits.

The claimant appealed the ALJ's Order and asserts a number of errors. Claimant first argues that the greater weight of the evidence supports his contention that he is an employee of respondent's and not an independent contractor. Secondly, claimant argues that estoppel does not apply to this situation and does not operate to bar his claim. Thus, claimant maintains the ALJ's Order should be reversed and his claim for benefits should be granted. [1]

[1] Claimant also alleges that K.S.A. 44-503c does not apply to this claim. Respondent does not assert that statute has any role in this matter, nor was that statute discussed at the preliminary hearing, nor did it form a basis in the ALJ's Order. Thus, this argument will not be addressed in this appeal.

Respondent argues the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's Order should be reversed in part and affirmed in part.

There is no apparent issue surrounding the claimant's accident or his need for treatment. Rather, the parties' dispute stems from the claimant's employment status as either an employee or an independent contractor. The ALJ concluded that claimant was an independent contractor. And he went on to find that claimant was barred by the doctrine of estoppel.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[4]

It is sometimes difficult to determine whether a person is an employee or independent contractor as there are elements pertaining to both relationships that may be present.[5] Moreover, there is no absolute rule that is determinative.[6] The relationship depends upon all the facts and circumstances and the label that the parties choose to employ is only one of those facts. Consequently, the terminology used by the parties is not binding.[7]

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[2] K.S.A. 2008 Supp. 44-501(a).

[3] K.S.A. 2008 Supp. 44-508(g).

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

[5] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[6] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[7] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control, right of supervision, or the right to direct the worker in the manner the work is to be performed. It is the existence of the right or authority to control, not the actual exercise of that right, that renders one a servant rather than an independent contractor.[8]

In addition to the right to control and the right to discharge a worker, other commonly recognized tests used in analyzing the relationship between parties are:

(1) the existence of a contract to perform a certain piece of work at a fixed price;

(2) the independent nature of the worker's business or distinct calling;

(3) the employment of assistants and the right to supervise their activities;

(4) the worker's obligation to furnish tools, supplies, and materials;

(5) the worker's right to control the progress of the work;

(6) the length of time that the worker is employed;

(7) whether the worker is paid by time or by the job; and

(8) whether the work is part of the regular business of the employer.[9]

The ALJ concluded that claimant was an independent contractor. But after considering the entirety of the record, this Board Member disagrees.

Respondent is a delivery company with no delivery drivers. Instead, respondent engages Contractor Management Services (CMS) to provide them with drivers so that respondent can complete the deliveries it promises. CMS "commissions" drivers and compels them to fill out a number of forms. One of these forms requires the applicants (including claimant) to copy three separate statements on a sheet of paper. They are as follows:

> I [Saad] have read the agreement and wish to provide services as an independent contractor to companies I am referred to by CMS.
>
> I am not an employee or agent of CMS or any company I am referred to by CMS, and agree that, as an independent contractor, I am not entitled to either workers' compensation or unemployment compensation benefits.

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[8] *Wallis*, 236 Kan. at 102-103.

[9] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

I am self-employed and I am responsible for my own taxes.[10]

There was an additional document entitled "Independent Service Area Contract" between claimant and respondent which declared that the contract could be terminated at will by either party, but limited claimant's ability to perform those same services for another company.

After completing these forms during the initial hiring process, which were given to him by John Whitsitt, *the regional operations manager for respondent,* claimant was assigned to a route. Included among these papers was an agreement between claimant and respondent that he would not compete against respondent after leaving this contractual relationship. There was also a handbook which contained respondent's directives regarding performance issues, timeliness and the required paperwork. Claimant also had the benefit of some insurance through CMS. Claimant was supposed to execute a contract to lease his truck which was to be used for his route, but that paperwork was never completed. He was nevertheless assigned a truck, a route, and set about performing his job.

When he was injured and notified his superiors, respondent denied he was an employee and offered all of the supporting documentation that existed which declared claimant to be an independent contractor and not an employee.

Although respondent obviously took steps to ensure that claimant would be viewed an independent contractor (thus negating respondent's responsibility for workers compensation coverage) the facts belie the parties' true relationship. Claimant was hired as a truck driver to drive a route for respondent. He was not told the route to take, only that he had to be on time in the delivery of the packages. He was paid a flat rate of $700 per week. He was provided with a truck which was paid for by respondent. Respondent provided gas and insurance and took care of the maintenance on the truck. While it is true that respondent intended for claimant to lease this truck, that endeavor never came to pass. The fact is that respondent provided the truck claimant used in his daily route, paid for all the expenses associated with that truck and limited claimant's ability to use the truck for other deliveries or obtain a substitute driver in the event he could not drive the route himself. Respondent even directed claimant to park the truck in a specific place after there was an issue of vandalism.

While respondent clothes itself in the fabric of a logistic service, it is, in essence, a package delivery company that does not have any drivers. Respondent must then obtain drivers in some fashion and does so through CMS. Claimant was hired, albeit through an intermediary, to perform those driving services. He was assigned a route, by respondent. He was provided a truck and expenses for that truck were paid for, by respondent. He was

[10] P.H. Trans., Resp. Ex. A at 6.

dictated to with regard to the time of delivery. While it is true that he was paid a flat rate, that fact alone is not determinative. Nor is the fact that there is an abundance of paperwork that suggests claimant is an independent contractor.

In spite of the paperwork and respondent's contentions to the contrary, this Board Member finds claimant's relationship with respondent is one of employer/employee. The ALJ's Award is, therefore, reversed on this issue.

As for the ALJ's finding that estoppel precludes claimant's claim, this Board Member finds claimant's claim for benefits is precluded by the doctrine of estoppel.

> ' ". . . Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . .' (*United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc*., 221 Kan. 523, 527, 561 P.2d 792 [1977].)"[11]

This concept was applied in *Marley* where an employee attempted to claim workers compensation benefits after receiving the benefits under another insurance policy. The *Marley* Court indicated that -

> We are not impressed by claimant's assertion that he did not read anything he signed. We assume that any party who has signed an agreement has read it and understands it.[12]

Here claimant concedes that he received benefits under a policy of insurance independent and apart from the workers compensation benefits he now seeks. But he maintains that he is unsophisticated, an Iraqi who speaks and reads English only marginally. He received those benefits apparently not fully appreciating the difference between the policies and benefits available to him. Claimant moved rather quickly after the accident in asserting a workers compensation claim. Claimant further concedes he did not read the documents he was asked to sign and the totality of his testimony certainly suggests that he did not understand the relationship purportedly carved out of the documents presented at the hearing.

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[11] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 504-505, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[12] *Id.*

Nevertheless, taken as a whole and in light of the *Marley* holding, this member of the Board finds the evidence establishes estoppel is applicable. The paperwork signed by claimant makes it abundantly clear that he was to be an independent contractor and not an employee. He signed up for insurance and went forward and made a claim under that policy. To be clear, this factual scenario is offensive, in that respondent has taken a multitude of steps to avoid workers compensation coverage while in effect, is a package delivery company with no drivers. It borders on the absurd to think a company can provide a service for which it has no employees to provide that service. Nonetheless, the facts support respondent's assertion that estoppel applies. Thus, that portion of the ALJ's Order is affirmed and claimant's request for benefits is denied.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[13] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated June 9, 2009, is reversed in part and affirmed in part.

IT IS SO ORDERED.

Dated this _____ day of August 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: John R. Stanley, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[13] K.S.A. 44-534a.